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No. 96-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

vs.

LAURIE ARBEITER *et al.*,

Petitioners.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEW YORK,
APPELLATE TERM, FIRST JUDICIAL DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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60 pp

QUESTIONS PRESENTED

Whether the dismissal of disorderly conduct charges against the Petitioners by the Criminal Court of the City of New York on the premise that it would be unjust to permit such convictions for conduct which resulted from a denial of Petitioners' First Amendment rights was correct?

Whether the reversal of the dismissal of disorderly conduct charges against Petitioners by the Appellate Term of the Supreme Court of the State of New York on the premise that such dismissal was unwarranted because the Petitioner's conduct involved sensitive political issues was correct?

RULE 29.6

Names of Petitioners:

Laurie Arbeiter
Helen Beale
Victoria Borgia
Chris Bossi
Sheila Brophy
Jeffrey Browne
Shannon Cain
Neal Calen
Frank Cambella
Sal Cecere
Sarah Chinn
Kelley Cogswell
Catherine Collins
Mark Collins
Allison M. Conaghan
Robert Considine
Mary Cotter
Io Cyrus
Chris Daley
Alexis Danzig
Joseph de Fillipis
Barbara de Lamiere
Michael Donohoe
Gail Dottin
Breeda Dugan
Melanie Fallon
Lisa Fane
Brendan Fay
Cindra Feuer
Claudia Flanagan
Kris Franklin
Patricia Glynn
Joanne Grover
Morgan Grenwald
Anne Habiby
Rebecca Hoffman
Marie Honan
Mary Beth Kaufman
Maura Kearney
Catch Keeley
Sarah Kelen
Michelle Kelley
Tom Kieran
Anne Kolodji
Tony Kushner
Anne Lamb
Elizabeth Lambert
Phyllis Lutsky
Lucy Lynch
Raquel Lynn
John Lyons
Kelley McCaig
Tarlach McNiallias
Anne Maguire
Timothy Martin
John Moore
Edward Moran
Laura Morrison
Carrie Moyer
John Nelson
Susan O'Brien
Hayyim Obadyah
Kevin O'Connor
George Perez
Sarah Pursley
Sheila Quinn
Christine Quinn
Julie Quinton
Joshua Reynolds
Kathleen Anise Richley
Cynthia Riley
Cora Roelofs
Patricia Ryan
Lisa Reddy
Terry Schleder-Scott
Sarah Schulman
Claire Shanley
Sarah Sheffield
Lisa Springer
Anne Stott
Cynthia Suchomel
Dana Tell
Polly Thistlewaite
Richard P. Urkiel
John Voelcker
Elizabeth Weisen
Maxine Wolf
Judy Yo

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners respectfully petition for a Writ of Certiorari to review the judgment of the New York State Supreme Court, Appellate Term, First Judicial Department, in this case.

OPINIONS BELOW

The opinion of the Criminal Court, Docket Number 94N486779X *et seq.* (Appendix A-1 to A-4, *infra.*) is unreported. The opinion of the Appellate Term, Index Number 96-022-024, (Appendix A-15 to A-24, *infra.*) is unreported. The Certificate of the Court of Appeals denying leave to appeal (Appendix A-25, *infra.*) is unreported.

JURISDICTION

The Appellate Term issued its decision on June 19, 1996. The New York State Court of Appeals declined to review the decision of the Appellate Term on December 30, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTORY PROVISION INVOLVED

The First Amendment to the U.S. Constitution provides, in relevant part, that:

> "Congress shall make no law abridging the freedom of speech...; or the right of the people peaceably to assemble....,"

U.S. Constitution, Amendment 1.

The New York State Penal Law § 240.20(5) provides, in relevant part, that:

> "A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof:...
>
> 5. He obstructs vehicular or pedestrian traffic.."

The New York State Criminal Procedure Law § 170.40 provides, in relevant part, that:

> "1. An information... may be dismissed in the interest of justice when, even though there may be no basis for dismissal as a matter of law... such dismissal is required as a matter of judicial discretion by the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such accusatory instrument or count would constitute or result in injustice."

STATEMENT

The facts of this case are clear and undisputed. Petitioners attempted to hold a march on March 17, 1994, to protest the

exclusion of the Irish Lesbian and Gay Organization ("ILGO") from the New York City St. Patrick's Day Parade ("the Parade"). The City of New York ("City") and the New York City Police Department ("the Police") agreed that the time and location of the proposed march were central to the message that Petitioners wanted to send, but nonetheless refused to allow the protest march, citing fears of public hostility and violence to Petitioners by Parade participants. Petitioners were arrested when they attempted to hold their march.

In the Criminal Court of the City of New York Petitioners moved to dismiss the charges claiming, *inter alia*, that the arrests had violated their rights to freedom of speech, assembly, equal protection and due process as guaranteed by the U.S. Constitution. The Court dismissed the charges on the basis that the arrests had violated Petitioners' rights to freedom of expression as protected under the First Amendment to the U.S. Constitution (Appendix A-11 to A-14). The Appellate Term of the Supreme Court of the State of New York reversed the dismissal, holding that the refusal to allow Petitioners to hold their proposed protest march was a sensitive political issue which did not warrant dismissal of the charges (Appendix A-16). The New York State Court of Appeals denied an application for leave to appeal the decision of the Appellate Term. Petitioners now petition this Court for a Writ of Certiorari to review the decision of the Appellate Term.[1]

Petitioners submit that the decision of the Appellate Term has such serious implications and repercussions not just for themselves but for all those who wish to excercise their rights to freedom of expression and freedom of assembly that it warrants review by this court.

---

[1] Petitioners were also charged with resisting arrest, New York State Penal Law § 205.30, and the criminal court also dismissed those charges. The Appellate Term upheld this dismissal, and the Court of Appeals simultaneously denied Respondent's application for leave to appeal that portion of the Appellate Term decision.

A. The protest march by the Petitioners.

Since 1991, ILGO has been denied permission to march in the Parade by the Parade organizers. Every year, this issue generates much public controversy and is the topic of debate in the local and national media. Subsequent to 1991, ILGO initiated litigation seeking to compel the organizers of the Parade, the Ancient Order of Hibernians ("the A.O.H."), to allow ILGO to participate in the Parade. That litigation took place in various fora with various parties intervening, and ultimately was concluded in the U.S. District Court for the Southern District of New York, in *A.O.H. v. Dinkins*, 814 F.Supp. 358 (S.D.N.Y. 1993). That decision, held, essentially, that the Parade organizers had the right, under the First Amendment to the U.S. Constitution, to exclude ILGO from the Parade. Meanwhile, in Boston, a similar battle was being fought between the organizers of the Boston St. Patrick's Day/Evacuation Day Parade and the Irish-American Gay, Lesbian and Bisexual Group of Boston (G.L.I.B.). That matter was eventually heard before this Court, which ruled that the Boston Parade organizers had the right, under the First Amendment to the U.S. Constitution, to exclude who it wanted, including G.L.I.B., *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S.Ct. 2338 (1995).

In the case at bar, the question is not whether or not ILGO has the right to participate in the Parade, but is, in essence, whether or not Petitioners should have been allowed to protest ILGO's exclusion from the Parade by way of a protest march along the Parade route, hours in advance of the Parade. Petitioners submit that the refusal to allow them to protest because of claims of community hostility to the protest march was a flagrant denial of their rights under the First Amendment to the U.S. Constitution.

The facts surrounding the events in question have never been seriously disputed.

In November 1993, ILGO announced plans to hold a protest march along the 5th Avenue Parade route, hours before

the 1994 Parade. That information was publicized through various media in the months leading up to the Parade. The time of the planned protest march was 9.00 a.m., three hours prior to the Parade, and the route of the protest march was along 5th Avenue, from 42nd Street north to 59th Street, the route that the Parade itself would take later that day (Appendix, A-4).

About two weeks prior to the Parade, a number of ILGO members met with the then-Chief of the New York City Police Department ("the Chief of Department"). The Chief of Department informed ILGO that it would not be permitted to march in protest on 5th Avenue between 42nd Street and 59th Street on the morning of the Parade, because of the risk of violence to ILGO from members of the public who were opposed to ILGO's participation in the Parade. The Police Department also stated that anyone who attempted to participate in such a protest march would be arrested (Appendix, A-4).

On or about the same time, ILGO members met with New York City Deputy Mayor Fran Reiter and her Chief of Staff. ILGO was again informed that it would not be permitted to protest on Fifth Avenue between 42nd Street and 59th Street on the morning of March 17, 1994, because of the alleged risk to ILGO and its supporters from Parade onlookers and participants who would be gathering early in the morning to see or participate in the Parade. The Deputy Mayor agreed with ILGO that protesting on 5th Avenue on the morning of St. Patrick's Day was central to the message ILGO wished to convey, and that that message could not be adequately conveyed in another place or at another time. The Deputy Mayor nonetheless informed ILGO that it would not be allowed to protest because of the risk to the protesters of public violence from the Parade goers and their supporters. Neither the Mayor's Office or Police Department ever provided ILGO with any precise details of who or what they felt the threat to ILGO's safety to be, or why the Police Department would be unable to adequately protect ILGO and its supporters (Appendix, A-4 to A-5).

On the morning of March 17, 1994, several hundred ILGO members and their supporters gathered on the steps of the New York City Public Library at 42nd Street and 5th Avenue about 9.00 a.m. At about 9.30 a.m. ILGO and its supporters stepped out onto 5th Avenue to commence a protest march. The protesters were told that if they did not leave the street they would be arrested. The police then arrested all those who did not leave the street (Appendix, A-5 to A-6).

Petitioners were arraigned in the Criminal Court of the City of New York and charged with the offense of disorderly conduct. Petitioners moved for a dismissal of the disorderly conduct charges arguing both that the arrests had violated their rights to freedom of speech and assembly, equal protection and due process pursuant to the Constitutions of the United States and the State of New York, and that the interests of justice mandated dismissal (New York Criminal Procedure Law § 170.40).

All charges were subsequently dismissed by the Criminal Court on October 27, 1994, on the basis that convictions for disorderly conduct under these particular circumstances would violate Petitioners' rights under the First Amendment to the U.S. Constitution (Decision of the Criminal Court, Appendix A-11 to A-13). Respondents appealed this dismissal to the Appellate Term of the Supreme Court, which reversed the dismissal and reinstated the charges (Decision and Order of the Appellate Term, Appendix, A-16 to A-17). Petitioners then sought leave to appeal this reversal to the Court of Appeals of the State of New York. On December 30, 1996, by Certificate Denying Leave, Petitioners' Leave application was denied (Appendix A-25).

B. The Proceedings in the Courts Below.

None of the factual allegations made by Petitioners were ever contradicted or challenged by Respondent, and upon appeal, Respondent did not challenge the findings of fact of the criminal court. In fact, Respondent has never questioned or disagreed with the factual presentation of the circumstances leading to the arrests in question: Respondent has only

disagreed with the conclusions made on the basis of those facts. As noted by the Criminal Court, neither the Office of the Mayor nor the Police Commissioner made any submissions to the Criminal Court (Appendix A-11).

The Criminal Court decision was framed in the context of C.P.L. § 170.40, which permits the dismissal of indictments and lower criminal court informations in the interest of justice. The gravamen of the criminal court decision was that Petitioners had a right, under the First Amendment, to hold their protest march at the time and place and in the manner sought, and that the actions of the police in refusing to allow the march to take place violated Petitioners' First Amendment rights.

Judge Sackett of the Criminal Court made the following findings of fact:

> "The fact that neither the Mayor's Office nor the Police Department forbade ILGO from conducting its protest elsewhere than Fifth Avenue or its side streets hardly provided ILGO with "ample alternative channels." Deputy Mayor Reiter acknowledged during her meeting with ILGO that the specific location selected for the protest was central to its message. *The goal of the protest was to symbolically claim the right to march along a street which had become intertwined with the annual celebration of Irish heritage and to appeal to the conscience of participants and onlookers of the St. Patrick's Day parade who would be gathered along the protest route. A different route would not have had the same emotional or symbolic impact. (Emphasis added)*
>
> "[i]t would be unjust to permit the police to obtain convictions against the defendants for conduct that was at worst a misguided response to the blatant denial of First Amendment rights by the police. To allow such convictions to occur would be to encourage further undermining of constitutional

> safeguards by those charged with their protection." (citations omitted).

Appendix, A-12 to A-13.

The Appellate Term, in reversing Judge Sackett's dismissal of the disorderly conduct charges, ruled:

> "The court's disagreement with the City's handling of what safely can be called a sensitive political issue hardly provides a "compelling" consideration "clearly demonstrating" that conviction or prosecution of the defendants would "result in injustice." (citations omitted).

Appendix, A-17.

Petitioners then sought leave to appeal this decision to the New York State Court of Appeals. On December 30, 1996, the Court of Appeals denied Petitioners' leave application (Appendix A-25). At no point during any of the appellate proceedings were the findings of fact of the criminal court questioned; Respondent's only disagreement with the outcome of the criminal court proceedings was with the legal conclusions reached rather than with the factual analysis.[2]

---

[2] In 1995 and 1996, ILGO sought, *inter alia,* injunctive relief in U.S. District Court to compel the City to issue a permit for the protest march, and in both years the applications were denied for failure to show a likelihood of success on the merits, *ILGO v. Brattan*, 882 F.Supp. 315 (S.D.N.Y. 1995), *aff'd* 52 F.3rd 311; *ILGO v. Giuliani*, 918 F.Supp. 732 (1996). Subsequent proceedings were dismissed as no permit applications were pending once the date of the Parade had passed. In *ILGO v. Brattan*, 882 F.Supp. 315, the District Court dismissed all proceedings once the date of the Parade had passed as no permit application was pending; in *ILGO v. Giuliani*, 949 F.Supp. 188 (1996), the District Court dismissed a challenge to the permit allocation system on the grounds of collateral estoppel. In both of those cases, the City rested its refusal to issue a permit purely on traffic congestion and made no references to threats of violence or public disorder. Those cases therefore have no bearing whatsoever on the case at bar, as the issues in question are different, although it is nonetheless

(Footnote continued)

Each year since 1994, including 1997, scores of people have been arrested for attempting to protest in the same time, place and manner as Petitioners, and there is every reason to conclude that this scenario will continue to repeat itself.

REASONS FOR GRANTING THE PETITION

The ruling of the criminal court in dismissing the accusatory instruments against Petitioners was correct and in accordance with all applicable law. The decision of the Appellate Term, by contrast, conflicts directly with many of this Court's decisions and established First Amendment jurisprudence.

Petitioners were not allowed to participate in the Parade because they are lesbians and gay men. Therefore, and quite logically, they sought to protest their exclusion. The City and the Police Department raised the specter of violent and unlawful conduct by Parade participants and supporters directed at Petitioners, and refused to allow Petitioners to have their protest march. Instead, they arrested them. The Police and the City thus ensured that no voice of opposition to the Parade's homophobic and exclusionary policies could be voiced on Fifth Avenue on St. Patrick's Day in New York City. It is this voice of opposition that First Amendment is expected to protect; without it, pubic debate is severely impaired, discriminatory practices cannot be directly challenged by those directly affected, and the streets become, not a marketplace of ideas, but instead the province of bigots and bullies. This Court's ruling in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S.Ct. 2338 *supra*, can neither have envisaged nor sanctioned such a result.

The only reason given for refusing to allow Petitioners to protest was the threat of hostility to Petitioners by Parade spectators and participants, yet "The possibility of disorder by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right... to be present." *Wright*

---

submitted that those cases were incorrectly decided, particularly the ruling of the District Court in *ILGO v. Brattan, id.*

v. Georgia, 373 U.S. 284, 292, 293 (1963), citing *Taylor v. Louisiana*, 370 U.S. 154 (1962), *Garner v. Louisiana*, 368 U.S. 157 (1961), *Buchanan v. Warley*, 245 U.S. 60 (1917); *see also Cox v. Louisiana*, 379 U.S. 536 (1965); *Watson v. City of Memphis*, 373 U.S. 526 (1963); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Terminiello v. City of Chicago*, 337 U.S. 1 (1949). The use of such a "heckler's veto" has been consistently rejected by the courts as an invalid basis for restricting the exercise of free speech in a public forum: "And such a prohibition [on speech], in addition, contains an obvious invitation to discriminatory enforcement against those whose association together is 'annoying' because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens," *Coates v. City of Cincinnati*, 402 U.S. 611 (1971).

This Court's decision in *Hurley supra*, upheld the right of parade organizers to be the architect of their own messages. The decision of the Appellate Term, by contrast, allows for only one voice to be heard on St. Patrick's Day. As the Criminal Court found, Petitioners could not effectively convey their message in some other place or at some other time. The St. Patrick's Day Parade in New York City, as much as in Boston, has become irretrievably and irrevocable intertwined with the efforts of Irish lesbian and gay groups to participate. The Appellate Term would allow the silencing of dissent to the homophobia of the Parade organizers by means of a vague and unsubstantiated yet highly effective "heckler's veto," which in this case meant that Petitioners could not exercise their speech rights because of the threat of violence to them by Parade participants and on-lookers.

Having determined that lesbians and gay men may be legally excluded from such Parades because of their sexual orientation, it runs directly contrary to the free speech principles enunciated by this Court in *Hurley* to allow the silencing of protest against such exclusion based on (vague and unsubstantiated) threats of public violence and disorder ("Parades are thus a form of expression, not just motion, and the inherent expressiveness of marching to make a point explains our

cases involving protest marches," *Hurley*, 115 S.Ct. 2338, 2345). Basic fairness as much as regard for the principles underlying this Court's First Amendment jurisprudence dictate that whatever other reasons may be propounded to regulate Petitioners' speech, the threat of retaliation by Parade participants cannot be used as such a justification. It would be a travesty to hold that the Parade organizers had the right to exclude Petitioners from their parade, and then the same organizers, by threat of violence, were able to silence any voices of dissent to this exclusion.

The factual scenario in the case at bar presents important issues regarding the exercise of constitutional rights to freedom of speech, expression and assembly, with repercussions to actors broader than those before this Court. Moreover, this issue continues to present itself, and promises to continue to repeat itself.

1. The Criminal Court was correct in finding that Petitioners were attempting to exercise protected First Amendment rights and that the actions of the police in arresting Petitioners violated those rights.

The Criminal Court ruled that the actions of the police in arresting the Petitioners instead of permitting them to march violated Petitioners' First Amendment rights. In this ruling, the Criminal Court correctly applied decades of Supreme Court rulings and accepted First Amendment jurisprudence to the factual scenario before it.

Petitioners were charged with Disorderly Conduct, a violation of Penal Law § 240.20(5), which provides that

> "A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof:...
>
> 5. He obstructs vehicular or pedestrian traffic."

Petitioners moved to dismiss the charges both in the interests of justice, pursuant to Criminal Procedure Law § 170.40, and

on the basis that a conviction would violate their rights under the First, Fifth and Fourteenth Amendments to the U.S. Constitution. The Criminal Court's dismissal of the charges, framed as an "interests of justice" dismissal (New York Criminal Procedure Law § 170.40), was based on Petitioners' First Amendment claims. Accordingly, the issue presented to this Court is whether or not the Appellate Term erred in its utter disregard of Petitioners' constitutional rights and in its implicit holding that the supposedly "politically sensitive" nature of the issue foreclosed judicial review. "Because the excuses offered for refusing to permit the fullest scope of free speech are often disguised, a court must carefully sort through the reasons offered to see if they are genuine," *Olivieri v. Ward*, 801 F.2d 602, 606 (2nd Cir., 1986).

The Criminal Court found, based upon the uncontested facts before it, that:

> "In November of 1993, ILGO publicly and repeatedly announced its intention to attempt again to stage a protest on St. Patrick's Day, 1994, between the hours of 9.00 a.m. and 10:00 a.m., and to march along [Fifth Avenue]. The permit issued to the Ancient Order of Hibernians specified a parade between 11:00 a.m. and 7.00 p.m. along Fifth Avenue from Forty-Fourth to Eighty-Sixth Streets.
>
> "In early March, 1994, ILGO representatives met with the highest ranking uniformed officer of the New York Police Department, Chief of Department John Timmony. Chief Timmony informed them that the police would arrest anyone who attempted to march along the planned protest route at the planned time, or near St. Patrick's Cathedral, or the side streets off Fifth Avenue, where participants of the official parade traditionally line up.
>
> "Chief Timmony told the ILGO representatives that the march would be prohibited because of the danger that on-lookers opposed to ILGO's participation in the official parade would physically attack

> the protest marchers and that the police would be unable to protect them. Chief Timmony did not give any reason for fearing that violence would occur nor did he explain why the large number of police officers assigned to line the official parade route would be unable to prevent or stop any such violence. Another basis for refusing to allow the march cited by Chief Timmony was that groups of individuals not affiliated with ILGO might attempt to demonstrate at St. Patrick's Cathedral during ILGO's march. Chief Timmony did not state any basis for this concern.
>
> "Shortly following the meeting with Chief Timmony, ILGO representatives met with Deputy Mayor Fran Reiter and her chief of staff. Ms. Reiter agreed that the specific place and time which ILGO had selected for their march was critical to conveying their message. Nevertheless, Ms. Reiter affirmed the police decision to ban the march. Like Chief Timmony, Ms. Reiter cited the danger of violent attacks on the marchers and the inability of the police to protect them. She did not state the basis for those conclusions.

Appendix, A-4 to A-5. The Criminal Court then found that:

> "This court remains unconvinced that defendants' rights to free speech and assembly under the state and federal constitutions were respected by the Office of the Mayor or the New York Police Department on the morning of March 17, 1994, before the defendants engaged in unlawful conduct.
>
> "The police had a legitimate interest in preventing any public disorder that might have ensued if violence broke out between ILGO marchers and St. Patrick's Day Parade participants and spectators. However, "constitutional rights may not be denied simply because of hostility to their assertion or exercise."

> "The willingness of the police to acquiesce to fears of unlawful, violent conduct by protest march onlookers was only exceeded in its impropriety but *(sic)* the fact that the police did not reveal the basis of those fears to ILGO representatives or this Court. Past history could not have been the basis; the morning of the 1992 St. Patrick's Day Parade ILGO held a protest march in much the same time, place and manner.
>
> "The fact that neither the Mayor's Office nor the police department forbade ILGO from conducting its protest elsewhere than Fifth Avenue on its side streets hardly provided ILGO with "ample alternative channels." Deputy Mayor Reiter acknowledged during her meeting with ILGO that the specific location selected for the protest was central to its message. The goal of the protest was to symbolically claim the right to march along a street which had become intertwined with the annual celebration of Irish heritage and to appeal to the conscience of participants and onlookers of the St. Patrick's Day parade who would be gathered along the protest route. A different route would not have had the same emotional or symbolic impact.

Appendix, A-11 to A-13. The decision of the Criminal Court is correct both on the facts and on the law. The facts have at no point been contradicted by Respondent, and it is clear that the Criminal Court's application of the law was precise and on target.

A parade, where people gather together for the purpose of expressing their message, is considered to be a pristine expression of the right of free speech, *Perry Educ. Assoc. v. Perry Local Educator's Association*, 460 U.S. 37 (1983); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Cox v. Louisiana*, 379 U.S. 536 (1965). The proposed march on 5th Avenue on St. Patrick's Day to protest exclusion from the Parade comes within the ambit of a "Parade," *Grayned v. City of*

Rockford, 408 U.S. 104 (1972), *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S.Ct. 2338 (1995). In *Hurley*, this Court noted that

> "If there were no reason for a group of people to march from here to there except to reach a destination, they could make the trip without expressing any message beyond the fact of the march itself. Some people might call such a procession a parade, but it would not be much of one. Real "[p]arades are public dramas of social relations, and in them performers define who can be a social actor and what subjects and ideas are available for communication and consideration." Hence, we use the word "parade" to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way... Parades are thus a form of expression, not just motion, and the inherent expressiveness of marching to make a point explains our cases involving protest marches.

id., 115 S.Ct. 2338, 2344, 2345 (citations omitted).

As a march whose central purpose was to "symbolically claim the right to march along a street which had become intertwined with the annual celebration of Irish heritage and to appeal to the conscience of participants and onlookers of the St. Patrick's Day parade who would be gathered along the protest route," (Appendix, A-12 to A-13), the location and time of the march - Fifth Avenue in New York City two hours before the Parade - were central to its message. Indeed, that much was acknowledged by the City through the Deputy Mayor. (And, "One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.," *Southeastern Promotions v. Conrad*, 420 U.S. 546, 588 (1975)). Any restrictions on that march would have to have been tailored to ensure that they did not deprive the march of its meaning. Clearly, a restriction which placed the march in a different location or on a different date would have rendered it meaningless. However,

any restrictions on the march, such as size and duration, would have had to have been content-neutral and unrelated to the content of the message in order to pass constitutional muster.

Incidental restrictions on free speech have been upheld where the purpose of the regulation in question is unrelated to the content of the expression, *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). These "incidental restrictions" will only withstand constitutional scrutiny if they are "justified without reference to the content of the regulated speech,... are narrowly tailored to serve a significant Government interest, and... they leave open ample alternative channels for communication of the information," *Ward v. Rock Against Racism*, *id.* at 791.

A municipality may constitutionally restrict the right to use public streets as they must exercise a great deal of control over traffic regulation and public safety, *Shuttlesworth v. Birmingham*, 394 U.S. 147, 152, but the method and extent of such regulation must be the least intrusive upon the freedom of expression as is reasonably necessary to achieve a legitimate purpose of the regulation, *United States v. O'Brien*, 391 U.S. 367 (1968). "When reviewing the reasonableness of time, place and manner restrictions on First Amendment rights, a court must independently determine the rationality of the government interest implicated and whether the restrictions imposed are narrowly drawn to further that interest," *Olivieri v. Ward*, 801 F.2d 602, 606 (2nd Cir., 1986). A government-imposed prior restraint on free speech is presumptively invalid, *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 588 (1975), and the burden is upon Respondent to justify the restraint. In the case at bar, Respondent has made no effort to justify the illegal regulation of Petitioners' speech.

"The possibility of disorder by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right... to be present." *Wright v. Georgia*, 373 U.S. 284, 292, 293 (1963), citing *Taylor v. Louisiana*, 370 U.S.

154 (1962), *Garner v. Louisiana*, 368 U.S. 157 (1961), *Buchanan v. Warley*, 245 U.S. 60 (1917); *see also Cox v. Louisiana*, 379 U.S. 536 (1963); *Watson v. City of Memphis*, 373 U.S. 526 (1963); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Terminiello v. City of Chicago*, 337 U.S. 1 (1949). In this case, no reason other than the threat of disorder by others was proffered to justify the exclusion of Petitioners from 5th Avenue, where they had a constitutional right to be present.

"The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views. "[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea."," *Edwards v. South Carolina*, 379 U.S. 229, 237 (citations omitted). These are the exact reasons why the proposed march in this case was not allowed to proceed - because of hostility to the message Petitioners wished to convey. And as a result the peaceful expression of Petitioners' views was made unlawful.

The restriction on Petitioners' message - namely, a total ban on the proposed march - was not the "least intrusive" method of regulation on the speech in question in order to achieve the desired result - a peaceful protest march. The total ban on the proposed protest march was fatal to the message sought to be communicated. The desired result could well have been achieved by having additional police protection or some other reasonable measures which ensured the safety of the marchers while allowing the protest march to take place.

In the case at bar, Petitioners had attempted to march on Fifth Avenue hours in advance of the Parade. Their march had a message whose effective and meaningful communication depended upon being on Fifth Avenue on St. Patrick's Day. It constituted protected speech within the context of the First Amendment. The restriction on the march was not a content

neutral restriction, as it was purely related to the content of their message and the perceived anger it would engender in supporters of the Parade ("Accordingly, a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger," *Terminiello v. Chicago*, 337 U.S. 1, 4). The Criminal Court held that the charges against Petitioners had to be dismissed because it would have been wrong to allow the Petitioners to be convicted for conduct that was precipitated by the denial of Petitioners' First Amendment rights by the City of New York and the police.

That ruling was correct and was in accordance with the decisions of this Court and applicable First Amendment jurisprudence.

2. The Appellate Term was in error when it characterized the important First Amendment right at stake as a "sensitive political issue" which did not warrant a dismissal of the disorderly conduct charges.

The Appellate Term ruled that "The [criminal] court's disagreement with the City's handling of what safely can be called a sensitive political issue hardly provides "compelling" consideration "clearly demonstrating" that conviction or prosecution of the defendants would "result in injustice"." Appendix, A-17 (citations omitted).

It is with that particular characterization of the ruling of the lower court, and the significant ramifications that flow from it, that Petitioners take issue.

Once the trial court clearly determined that Petitioners were all arrested in violation of their rights under the First Amendment, it became irrelevant whether or not the trial court dismissed the charges in the interests of justice or because of the constitutional violation. What is relevant is that the Appellate Term recast Petitioners' constitutional claims as a "sensitive political issue" and held that dismissal of the

charges was unwarranted. In any event, "[t]he assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.," *Wright v. Georgia*, 373 U.S. 284, 289 (1963), citing *Davis v. Weschler*, 263 U.S. 22, 24 (1923).

The extent of the public debate and the sheer volume of litigation in the lower courts surrounding the issue of participation by lesbians and gay men in St. Patrick's Day parades is proof positive that this in fact *is* a sensitive issue, not just in the political arena. Assuming *arguendo* that this controversy presents political considerations for the City and the Police does not conclude the debate; on the contrary, because of the constitutional dimension of the rights involved, it ignites it. It is the troubling conclusion by the Appellate Term to the contrary which makes this case warrant review by this Court. Surely access to public debate of what may be a sensitive political issue warrants more rather than less judicial scrutiny. That is particularly the case when, as here, the government attempts to decide not just who can speak but what the speaker can say, how they can say it and who can hear that message.

The Appellate Term had the opportunity and ability to review the factual findings made by the Criminal Court, but it did not do so. Once the Appellate Term accepted those findings, however, the actions of the Petitioners must be viewed in the context of protected First Amendment activity. The only permissible restrictions on such activity are those which are without reference to the content of the regulated speech, narrowly tailored to serve a significant Government interest, and which leave open ample alternative channels for communication, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1988). Refusing to allow Petitioners to protest because of community hostility is by its very nature a content-based regulation, *Chicago v. Mosley*, 408 U.S. 92, 101 (1972), and allowing a protest even with the threat of community hostility is a risk which the Constitution says we must take, *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 508 (1968), citing *Terminiello v. Chicago*, 337 U.S. 1 (1949).

"The principal inquiry in determining content neutrality, in speech cases generally and in time, place or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration," *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1988), citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). It is clear that the government's purpose in this case was to stifle Petitioners' speech because of the supposed threat of disorder by those opposed to Petitioners' message. Clearly, then the government disagreed with Petitioners' message, or, at any rate, with its dissemination. The controlling consideration for the government was the reaction such speech might engender, and in order to avoid such a reaction it stifled Petitioners' speech. "It is not up to the City or its officials to determine those issues worth debating in a public forum. In the field of expression all ideas are considered equal," *Oliveiri v. Ward*, *supra*, 801 F.2d 602, 606. "Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say," *Chicago v. Mosley*, 408 U.S. 92, 96 (1972).

There is no support for the notion that First Amendment issues become immune fromjudicial review merely because they are raised as a defense to a criminal prosecution. On the contrary, this Court has frequently reversed convictions obtained in violation of First Amendment rights, often in situations which had sensitive, if not volatile, political considerations, *e.g.*, *Shuttlesworth v. Birmingham* 394 U.S. 147 (1968); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Terminiello v. Chicago*, 337 U.S. 1 (1948). Accordingly, the Appellate Term should have addressed the substance of Petitioners' First Amendment claims. Had it done so, it would have been bound to follow the reasoning of the lower court. Instead, it gave carte blanche to the City and the Police Department to censor any speech when its dissemination presented either a supposed threat to the speaker or any political concerns.

The Appellate Term clearly felt that the constitutional considerations in this case did not present a "compelling interest" which warranted dismissal in the interests of justice. However, the reasoning of that Court fails any legal analysis. The Criminal Court took the undisputed facts before it and found clear violation of Petitioners' First Amendment rights and dismissed the charges because "[t]o allow such convictions to occur would be to encourage further undermining of constitutional safeguards by those charged with their protection," (Appendix, A-13). The procedural mechanics of the Criminal Court's ruling are not determinative; it is the principle which that Court enunciated which should have been upheld. Indeed, if the Court did not dismiss the charges in the interests of justice it would have been bound to dismiss purely on the basis of the constitutional violations.[3]

In sum, the decision of the Appellate Term was in error when it held that, because Petitioners' desire to convey a message against homophobia and intolerance presented a "sensitive political issue" for the City of New York, that the Criminal Court should not have dismissed the disorderly conduct charges but should have deferred to the judgment of the City and the Police, even if that judgment was impaired. This decision should be reversed and the dismissal of the charges should be reinstated.

3. The Question Presented Is Important And Warrants Review By This Court.

The questions presented in this case meet several of the criteria which this court has previously held to warrant review: the case at bar involves fundamental free speech and assembly rights, *Edwards v. South Carolina*, 372 U.S. 229

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[3] It is indeed arguable that the Criminal Court should have followed that path as New York Criminal Procedure Law § 170.40 provides that a motion to dismiss in the interests of justice shall only be reached if there is no statutory or other basis for a dismissal. However, such a discussion is academic, as the reasoning of the Court is proper when viewed in either context.

(1963); the decision of the Appellate Term is clearly erroneous, *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982); *Chicago & N.W. Trading Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981); and the error concerns an important and recurring constitutional problem, *New York Transit Authority v. Beazer*, 440 U.S. 568 (1979); *Williams v. Lee*, 358 U.S. 217 (1959).

The actions of the Appellate Term encourage the unconstitutional exercise of Governmental power and authority if the freedom of expression sought to be regulated is politically sensitive in nature. If the reasoning of that Court were to be correct, none of the cases involving protest marches would ever have made it onto this Court's docket. While it is undisputed that the City and the Police Department have an interest in keeping the streets orderly and crime-free, "Law and order are not to be preserved by denying Petitioners their constitutional rights," *Watson v. Memphis*, 373 U.S. 526, 535. This is one of the reasons this Court has considered cases involving protest marches in the past.

In every year since 1991, the issue of participation by lesbians and gay men in St. Patrick's Day parades has been a significant one, which has been played out in various fora, from the media to the streets and, inevitably, to the courts. This Court has previously addressed the issue in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S.Ct. 2338, *supra,* and the situation in New York has been litigated in state and federal courts (*see* fn. 2, *supra*). The legal question of exclusion of lesbians and gay men from St. Patrick's Day parades having been resolved by this Court in *Hurley*, *supra*, the question has now become whether or not there exists a right to protest such exclusion. When there is a sincere and legitimate governmental interest to circumscribe time and place in the exercise of free speech, such reasonable restraint is lawful. But on the facts in this case, the reasons proffered by the police department - that the protesters themselves would be in jeopardy - were disingenuous, unsubstantiated and unlawful: that the content of Petitioners' message was so inflammatory that it could not be accommodated. The

constitutional question this presents is significant, recurring, and clearly will not abate for as long as the exclusionary policies of the Parade organizers are in effect.

In New York, every year ILGO members and their supporters attempt to protest their exclusion from the Parade, every year their attempt is spurned by the City and the Police Department, and every year scores of people are arrested and charged with disorderly conduct. These cases spend about one year in the criminal court system, and verdicts and dismissals are routinely appealed. There has never been a full hearing on the merits of the constitutional right of ILGO to have its protest march. There have been two hearings on applications by ILGO for preliminary injunctions to compel the City, through the Police Department, to issue a permit, which were denied, and those cases were subsequently dismissed on various technical and procedural grounds (*see* fn. 2, *supra*). Those cases presented reasons for the permit denial different from the reasons proffered in this case, which lends credence to the notion that the reasons for not allowing Petitioners to march were pretextual.

In *Hurley*, 115 S.Ct. 2338 (1995), this Court unanimously upheld the right of the organizers of St. Patrick's Day Parades to exclude lesbians and gay men based upon the First Amendment rights of the parade organizers. The *Hurley* decision reaffirmed in strong terms this Court's prior decisions on free speech rights associated with parades and marches. If indeed the organizers of the Parade have the right under the First Amendment to exclude Petitioners from the Parade, surely it follows that Petitioners have the clear right to protest this exclusion. It is also clear that this right is eviscerated if Petitioners cannot exercise it because of supposed hostility by the Parade participants and their supporters. Such logic gives judicial imprimatur to the ruthless exercise of a "heckler's veto" which this Court has consistently found to be intolerable.

If a group of people had wished to hold a march at the time appointed by Petitioners, and the message of such march was

not critical of the Parade, clearly the Police Department and the City would have had no basis to deny it because, in theory, this message would not invite confrontation. It seems unfair, to say the least, that a march which does not question the homophobia of the Parade organizers can take place on Fifth Avenue in advance of the Parade but one which does question it may not take place. In reality, however, that is what happens every St. Patrick's Day in New York: the 69th Regiment of the National Guard marches on Fifth Avenue along the route desired by Petitioners for their protest march at the same time that Petitioners want to protest. This march is facilitated by the City and the Police Department, even though no permit is actually held for it (*see ILGO v. Bratton*, 882 F.Supp. 315, 317, 318). This march is implicitly regarded as supportive of the Parade (*id.*, 317, 318) and its members are not arrested. Petitioners, lesbians and gay men, are explicitly regarded as not belonging in the Parade, however, and are subjected to a different standard for the exercise of their constitutional rights. This is a content-based regulation.[4]

To uphold the reasoning of the Appellate Term would be to favor one of the voices - that of the Parade organizers - and to silence the other - that of the lesbians and gay men excluded from the parade. Such a result is not only contrary to the rationale of this Court in *Hurley*, it runs counter to the long-established principle that the government may not favor the dissemination of one voice over that of another, nor may it silence those voices with which it disagrees. The use of the streets as a means of expressing a message is constitutionally protected. If a smaller or weaker group could not, because of the threat of violence from the larger or more powerful group,

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[4] This raises troubling issues of equal protection under the Fourteenth Amendment as well. It burdens both a fundamental right - the right to free speech and assembly - without having a rational relation to any legitimate end, and is only explicable by animus toward the class - lesbians and gay men - that it affects, *see*, *Romer v. Evans*, 116 S.Ct. 1620, 1627 (1996) (holding, *inter alia*, that a bare desire to harm a politically unpopular group, in this case lesbians and gay men, cannot constitute a legitimate government interest for the purposes of the Fourteenth Amendment).

exercise any voice of protest, then the demonstrations, marches and protests that are the hall-mark of civil rights movements would not be able to take place. In short, public dialogue, debate and social change would be severely stifled. Such are the implications of the decision of the Appellate Term in this matter.

There are eighty-eight Petitioners in this case. The sheer numbers alone involved should compel this Court to grant Certiorari. However, the issues presented herein are not limited to this proceeding nor indeed to St. Patrick's Day Parades in general, but present important questions fundamental to the proper exercise of constitutional freedoms.

There are, every year, in New York City, innumerous protest marches, involving any number of issues. The decision of the Appellate Term, if it were to be allowed to stand, means that every time the exercise of a First Amendment right becomes a "sensitive political issue" (which, in New York City, is always), First Amendment claims presented in court as a defense to criminal charges cannot be considered. The public policy considerations flowing from such a scenario are clear and important.

In sum, the decision of the Appellate Term is a significant impairment on the ability of individuals and groups to exercise their rights under the First Amendment to the U.S. Constitution. Its effect is to foreclose judicial review of questions involving the exercise of protected speech and assembly rights if there is even an assertion that there are "sensitive political issues" also involved (Appendix A-17). It is an affront to traditional notions of free speech, public debate and the time-honored fight to publicly air unpopular views. This decision flies in the face of the First Amendment and must be reversed.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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APPENDIX

Appendix

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART AP-5

THE PEOPLE OF THE STATE OF NEW YORK	DECISION and ORDER
– against –	Docket No. 94N486779X et. seq.
LAURIE ARBEITER, et. al., Defendant.	

ROBERT A. SACKETT, J.:

Defendants, charged with disorderly conduct (P.L. §240.20[5]) and in the case of thirty defendants, resisting arrest (P.L. §205.30) as well, move for an order to dismiss the information in the interest of justice, pursuant to CPL §170.40; to dismiss the information as a violation of their rights to freedom of speech and assembly, equal protection and due process pursuant to the constitution of the United States and the State of New York; to compel discovery and a bill of particulars pursuant to preclude cross-examination of defendants by reference to criminal conviction or bad acts pursuant to *People v. Sandoval*, 34 NY2d 371; CPL §§240.20 and 200.95; and leave to make further motions if necessary, pursuant to CPL §255.20(3).

DISMISSAL IN THE INTEREST OF JUSTICE

CPL §170.40(l) provides that a court is "required as a matter of judicial discretion" to dismiss an accusatory instrument if "some compelling factor, consideration or circumstance clearly demonstrates that conviction or prosecution of the defendant upon such accusatory instrument or count would constitute or result in injustice." The statute lists the following

ten factors which the court should consider in making this determination:

(a) the seriousness and circumstances of the offense;

(b) the extent of harm caused by the offense;

(c) the evidence of guilt, whether admissible or inadmissible at trial;

(d) the history, character and condition of the defendant;

(e) any exceptionally serious misconduct of law enforcement personnel in the investigation, arrest and prosecution of the defendant;

(f) the purpose and effect of imposing upon the defendant a sentence authorized for the offense;

(g) the impact of dismissal upon the safety or welfare of the community;

(h) the impact of dismissal upon the confidence of the public in the criminal justice system;

(i) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion; and

(j) any other relevant fact indicating that a judgment of conviction would serve no useful purpose.

The court has viewed two videotapes of the incident in question one made by officers of the New York Police Department and the other by the Irish Lesbian and Gay Organization and submitted by the District Attorney and defense counsel respectively. The court has also studied the pleadings and other submission of counsel and defense counsel, respectively. The oral commentary on the audio portion of the police videotape has been disregarded.

PROCEDURAL HISTORY

The facts are not in dispute. The defendants, numbering 90 persons, are members or supporters of the Irish Lesbian and Gay Organization (ILGO). The group has been attempting unsuccessfully since 1991 to march as an identified group in the annual March 17 St. Patrick's Day parade along Fifth Avenue. These efforts have included a request to the sponsors of the parade, the Ancient Order of Hibernians (AOH), a complaint to the City Commission in Human Rights and application for injunctive relief in the United States District Court for the Southern District.

ILGO members marched in the 1991 parade at the invitation of an AOH chapter, but without an ILGO banner. Then-Mayor David Dinkins marched with them, and some spectators jeered and/or threw beer cans as the marchers passed.

In 1992, ILGO chose not to accept bannerless participation and instead held a separate march along approximately ten blocks of the official parade route in the opposite direction the official parade was to travel later that morning. Although they were subjected to verbal abuse along the way, there were no incidents of violence.

In 1993, ILGO once again did not attempt to seek AOH permission to march in the official parade. Less than three weeks before St. Patrick's Day, ILGO announced plans to hold another protest march to begin and end before the start of the official parade along part of the official parade route, between Fifty-Ninth and Forty-Second Streets. After two temporary restraining orders were issued against them by the New York State Supreme Court, the second of which barring any march along Fifth Avenue, ILGO attempted to stage a march northward along that thoroughfare from Forty-Second Street. When the marchers reached Forty-Third Street many of them were arrested for disorderly conduct and criminal contempt by a large contingent of police officers who had cordoned off Fifth Avenue. All charges were eventually dismissed at the request of the District Attorney.

In November of 1993, ILGO publicly and repeatedly announced its intention to attempt again to stage a protest on St. Patrick's Day, 1994, between the hours of 9:00 a.m. and 10:00 a.m. and to march along the same route as they had attempted to take in 1993. The permit issued to the Ancient Order of Hibernians specified a parade between 11:00 a.m. and 7:00 p.m. along Fifth Avenue from Forty-Fourth to Eighty-Sixth Streets. The record does not indicate whether ILGO formally requested a parade permit from the police. The court will assume therefore that no formal request for a parade permit was made.

In early March, 1994, ILGO representatives met with the highest ranking uniformed member of the New York Police Department, Chief of Department John Timmony. Chief Timmony informed them that the police would arrest anyone who attempted to march along the planned protest route at the planned time, or near St. Patrick's Cathedral, or on the side streets off Fifth Avenue, where participants of the official parade traditionally line up.

Chief Timmony told the ILGO representatives that the march would be prohibited because of the danger that onlookers opposed to ILGO's participation in the official parade would physically attack the protest marchers and that the police would be unable to protect them. Chief Timmony did not give any reason for fearing that violence would occur nor did he explain why the large number of police officers assigned to line the official parade route would be unable to prevent or stop any such violence. Another basis for refusing to allow the march cited by Chief Timmony was that groups or individuals not affiliated with ILGO might attempt to demonstrate at St. Patrick's Cathedral during ILGO's march. St. Patrick's Cathedral is located on Fifth Avenue between Fiftieth and Fifty-First Streets. Again, Chief Timmony did not state any basis for this concern.

Shortly following the meeting with Chief Timmony, ILGO representatives met with Deputy Mayor Fran Reiter and her chief of staff. Ms. Reiter agreed that the specific place and

time which ILGO had selected for their march was critical to conveying their message]. Nevertheless, Ms. Reiter affirmed the police decision to ban the march. Like Chief Timmony, Ms. Reiter cited the danger of violent attacks on the marchers and the inability of the police to protect them. She did not state the basis for those conclusions.

The record does not indicate that ILGO commenced any action to secure judicial relief from the banning of its protest march.

At approximately 9:00 a.m. on March 17, 1994, a crowd of about 200 persons, including the defendants in the instant matter, entered the roadway of Fifth Avenue just south of its intersection with Forty-Second Street. The crowd proceeded northbound as a group at a walking pace. The marchers sang songs and chanted various slogans, including "Let us March" and Who's Street? Our Street." They came to a halt a few feet south of a phalanx of uniformed police officers positioned across the northside of the intersection.

Vehicular traffic in both directions along Forty-Second Street was blocked by the presence of the marchers in the intersection. Vehicular traffic along Fifth Avenue was prevented from proceeding southbound past Forty-Third Street by another line of uniformed police officers stretching across the south side of the intersection of that street and Fifth Avenue. Fifth Avenue traffic was diverted westbound along Forty-Third Street.

At 9:45 a.m., a uniformed police official warned the marchers that they would be arrested if they did not move off the roadway. Many of the marchers sat down on the pavement, others remained standing and yet others complied with the order and left the area.

The police began to escort individual marchers to police vans that had been driven up to the intersection. Ninety-seven persons were arrested in all. Before being escorted inside, each prisoner was photographed. The formalities of each arrest were videotaped. Several marchers, who had sat down on

the roadway were carried passively to the vans. None of the defendants forcibly attempted to prevent his or her arrest or could be heard making loud, abusive or obscene comments to the police officers.

The last arrest was processed and completed at 10:30 a.m. At 10:35 a.m. traffic was moving freely through the intersection.

The District Attorney has proposed an adjournment in contemplation of dismissal for all defendants the offer of which was rejected by defense counsel.

SERIOUSNESS AND CIRCUMSTANCES OF THE OFFENSES

All of the 90[1] defendants are charged under a provision of the disorderly conduct statute which makes it an offense to obstruct vehicular traffic with the intent to cause public inconvenience, annoyance or alarm *(see*, P.L. §240.20[5]). Disorderly conduct is classified as a violation, not a crime *(Id.; see*, P.L. §10.00[3] and [6]). This offense is punishable by imprisonment for no more than 15 days, by imposition of a fine of no more than $250.00 or a conditional discharge.

Thirty of the defendants are also charged with resisting arrest, a class A misdemeanor (P.L. §205.30). To be found guilty of this offense a person must intentionally prevent or attempt to prevent a police officer from making an authorized arrest of him or another person (P.L. §205.03). An arrest is authorized when the police officer had reasonable cause to believe the defendant had committed an offense in his presence *(People v. Peacock*, 68 NY2d 675). Resisting arrest is a crime and is punishable by imprisonment for up to one year (P.L. §70.15[1]).

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[1] The cases of seven of those arrested and charged were dismissed at an earlier date for facial insufficiency *(see*, CPL §100.40[l] and *People v. Alejandro*, 70 NY2d 133).

Whatever the specific circumstances that would justify a disorderly conduct conviction, the legislature's classification of the offense as a violation and not a crime plus the shortness of the maximum possible sentence make such misconduct inherently minor in nature, from a purely legal viewpoint. This is not to say that the court minimizes the inconvenience, annoyance, and delay the intentional blocking of a major midtown Manhattan intersection during morning rush hour caused for hundreds if not thousands of commuters, drivers of delivery trucks, buses and taxis and other travelers.

Resisting arrest, unlike disorderly conduct is classified as a crime. Provision for a possible sentence of one year imprisonment clearly indicates that the legislature considers such conduct to be, under some circumstances, a serious offense. In some situations, resistance can lead to physical injury to the arresting officer and/or the defendant. This is the danger that the statute is intended to prevent *(People v. Bauer*, __ Misc.2d __, 614 NYS2d 871, 878; and *see, People v. Simms*, 36 AD2d 23).

In the instant matter, not only was the risk of injury low, but the conduct of those who had to be carried to the police vans did not rise at all to the level necessary for conviction of resisting arrest. Merely by going limp or refusing to stand up and walk to a police van none of the protesters prevented or attempted to prevent any arrest. At most, they attempted to delay or obstruct an arrest and such a purpose is no longer prohibited under the resisting arrest statute (*People v. McDaniel*, 154 Misc.2d 89; *compare, People v. Williams*, 25 NY2d 86).

To be sufficient, an information charging resisting arrest must allege non-hearsay facts that establish, if true, every element of that offense (*see*, CPL §100.40[1] and *see*, *People v. Alejandro, supra*). Defendant may not be brought to trial unless this requirement is satisfied (*Id.*).

The accusatory instrument before this court fails to allege an act by defendants that would supply a critical element of the crime of resisting arrest. Therefore, the resisting arrest

counts against all defendants so charged are dismissed as facial insufficient.

EXTENT OF HARM CAUSED BY THE OFFENSE

In response to the ILGO leadership's repeated announcements in the days leading up to March 17, 1994 that their planned march up Fifth Avenue would go on as scheduled despite a warning by the police that the marchers would be arrested, a large number of uniformed officers was assigned to the block between Forty-Second and Forty-Third Streets. Presumably those officers either were diverted from other assignments or were called in on their regular day off and given overtime pay. No doubt the city incurred some expense for this massive reaction.

When ninety-seven marchers refused a direct police order to leave the intersection of Fifth Avenue and Forty-Second Street, they snarled traffic for an hour and a half and caused delay and inconvenience for an untold number of their fellow New Yorkers. The fact that the marchers did not engage in any violence against persons or property weighs in their favor but does not lessen the harm caused by their actions.

Nevertheless, the degree to which blame for this harm can be attached to the protest marchers ultimately depends on a determination of the correctness or incorrectness of the police department's decision to ban the protest march and to arrest those who disobeyed that ban (*see*, discussion *infra*).

EVIDENCE OF GUILT

There is uncontrovertible evidence that all of the defendants engaged in conduct that obstructed vehicular traffic. Moreover, given the veritable wall of police officers which blocked the demonstrators' intended path up Fifth Avenue, the decision of the defendants not to clear the intersection at Forty-Second Street which would have permitted vehicular traffic to pass demonstrated their intention to inconvenience the public, albeit if only to make a political point (*see*, P.L. §240.20[5]).

Whatever the constitutional validity of the police refusal to allow the protest march to proceed, the defendants themselves acted unlawfully. Two weeks before the date of the scheduled protest ILGO was put on notice that the police would not permit the march to proceed. The record is bare of any indication that the defendants' sought to avail themselves of the judicial process to force the police and city to issue them a parade permit. A mandamus action, commonly referred to as an Article 78 proceeding, gives the courts of New York authority to compel officials to act in accordance with their legal duties (*see*, CPLR §7803). The municipal regulation governing parades requires issuance of a permit unless the commissioner of police "has good reason to believe that the proposed parade ... will be disorderly in character or tend to disturb the public peace" (Administrative Code of the City of New York §10-110). ILGO was not, therefore, confronted by a regulation that granted the police overbroad discretion to deny them a permit which would have justified a protest march in defiance of the police order (*compare, Shuttlesworth v. City of Birmingham, Ala.*, 394 US 147). Nor was ILGO faced with the prospect of appealing to a judiciary resolutely hostile to their First Amendment complaint.

As to the charges of resisting arrest, for the reasons stated *supra*, there is insufficient evidence of guilt.

HISTORY, CHARACTER AND CONDITION OF THE DEFENDANTS

The court has not been presented with detailed background information about any of the defendants. Many of the defendants have submitted impassioned affidavits attesting to their strong opposition to discrimination on the basis of sexual orientation in general and the exclusion of a gay and lesbian Irish organization from participation in the St. Patrick's Day parade in particular.

As the district attorney concedes, the defendants appear to be sincere in their beliefs. Their violation of the law was clearly intended to draw attention to their cause and not to block traffic for its own sake.

Lofty purposes, however, do not absolve a defendant, especially a defendant professing a commitment to justice, from his obligation to respect the law and the legal process. The defendants' conduct, pleadings and affidavits betray a casual disregard for the process developed over many centuries and often at great personal sacrifice to prevent wrongdoing by public officials. A fair inference from this record is that neither ILGO nor the defendants ever considered going to court as an alternative to a confrontation with the police in the streets.

ANY EXCEPTIONALLY SERIOUS MISCONDUCT OF LAW ENFORCEMENT PERSONNEL IN THE INVESTIGATION, ARREST AND PROSECUTION OF THE DEFENDANTS

Defendants' allegations that several of them were handcuffed too tightly, that one of them was pushed to the floor of the police van and that one was held overnight for a warrant check with negative results are not examples of exceptionally serious police misconduct. The court knows of no other circumstances that would justify such a conclusion.

PURPOSE AND EFFECT OF IMPOSING UPON DEFENDANTS A SENTENCE AUTHORIZED FOR THE OFFENSE

It is not likely that any of the defendants if convicted would be sentenced to a term of incarceration. A fine of up to $250.00 or a conditional or unconditional discharge is authorized for disorderly conduct (*see*, P.L. §§80.05[4], 65.20[l], 65.05[l] and [3][b]). The court does not view a fine or a conditional or unconditional discharge to be unduly burdensome sentences to these defendants.

THE IMPACT OF A DISMISSAL ON THE SAFETY OR WELFARE OF THE COMMUNITY

The People have not argued that dismissal would endanger the safety or welfare of the community. The court finds nothing in the record to indicate otherwise.

THE IMPACT OF A DISMISSAL UPON THE CONFIDENCE OF THE PUBLIC IN THE CRIMINAL JUSTICE SYSTEM

Given the notoriety of this case and the extensive news media coverage of ILGO's lengthy dispute with the Ancient Order of Hibernians over participation in the St. Patrick's Day parade, a decision on this motion is likely to have an impact on public opinion. A dismissal, if unwarranted and unsubstantiated, would reflect badly on the court and lessen public confidence in the impartiality and integrity of the criminal justice system. A dismissal that would comport with the principles and values of a fair play and respect for free speech would strengthen the public's faith in the court as a guardian their freedoms.

ATTITUDE OF THE COMPLAINANT WITH RESPECT TO THE MOTION

Neither the Office of the Mayor, the office of the Deputy Mayor nor the Police Commissioner have made submissions.

ANY OTHER RELEVANT FACT INDICATING THAT A JUDGMENT OF CONVICTION WOULD SERVE NO USEFUL PURPOSE

To be sure, the arrest and prosecution of the defendants was the direct result of their decision to disobey an order of the police to remove themselves from the middle of a busy intersection. However, it is equally true that had the defendants been permitted to march up Fifth Avenue on part or all of the roadway, as they had planned, traffic would not have been obstructed unlawfully and these arrests would not have occurred.

This court remains unconvinced that defendants' rights to free speech and assembly under the state and federal constitutions were respected by the Office of the Mayor or the New York Police Department on the morning of March 17, 1994, before the defendants engaged in unlawful conduct.

Parade and marches are methods of expression and are entitled to constitutional protection (*Shuttlesworth v. City of Birmingham, Ala., supra* at 152). The police department had the authority, of course, to restrict the time, place and manner of ILBO's planned protest march, but those restrictions had to be reasonable and without reference to the content of that expression (*see, Ward v. Rock Against Racism*, 491 US 781). Furthermore, those restrictions had to be "narrowly tailored to serve significant governmental interests and leave open ample alternative channels for communication of information" (*Id*).

The police had a legitimate interest in preventing any public disorder that might have ensued if violence broke out between ILGO marchers and St. Patrick's Day parade participants and spectators *(see, People v. DeBour*, 40 NY2d 210, 218; *Boung Jae Jang v. Brown*, 161 AD2d 49). However, "constitutional rights may not be denied simply because of hostility to their assertion or exercise" *(Cox v. Louisiana*, 379 US 536, 551 [quoting, *Watson v. Memphis*, 373 US 526, 535]).

The willingness of the police to acquiesce to fears of unlawful, violent conduct by protest march onlookers was only exceeded in its impropriety but the fact that the police did not reveal the basis of those fears to ILGO representatives or to this Court. Past history could not have been the basis; the morning of the 1992 St. Patrick's Day parade ILGO held a protest march without any violent incidents in much the same time, place and manner.

The fact that neither the Mayor's Office nor the police department forbade ILGO from conducting its protest elsewhere than Fifth Avenue on its side streets hardly provided ILGO with "ample alternative channels." Deputy Mayor Reiter acknowledged during her meeting with ILGO that the specific location selected for the protest was central to its message. The goal of the protest was to symbolically claim the right to march along a street which had become intertwined with the annual celebration of Irish heritage and to appeal to the conscience of participants and onlookers of the St. Patrick's Day

parade who would be gathered along the protest route. A different route would not have had the same emotional or symbolic impact.

The unreasonable refusal of the City and police to let ILGO hold its march did not justify the defendant's unlawful response. Nevertheless, it would be unjust to permit the police to obtain convictions against the defendants for conduct that was at worst a misguided response to the blatant denial of First Amendment rights by the police. To allow such convictions to occur would be to encourage further undermining of constitutional safeguards by those charged with their protection.

There is little reason to fear that a dismissal of the disorderly conduct counts in the interest of justice will prompt others to defy a police order not to hold a parade or protest march instead of seeking judicial review of such an order. What occurred on March 17, 1994, was a gross deviation from the norm. This court is confident that the city and police will respond to future parade permit requests appropriately, i.e., in full recognition that such permits "shall" be issued with reasonable limits as to time, place and manner (*see*, Administrative Code of the City of New York §10-110).

For these reasons, the disorderly conduct counts against those defendants charged only with that offense is granted. The motion to dismiss the disorderly counts against those defendants charged with that offense and resisting arrest, which this court has dismissed as facially insufficient, is also granted.

Because the Court has been able to adjudicate this matter by reference to statutory law, it declines to reach the defendants' motion to dismissal which is grounded in the state and federal constitutions.

This opinion constitutes the decision and order of the court.

Dated: October 27, 1994
New York, New York

/s/ Robert A. Sackett

ROBERT A. SACKETT
Judge of the Criminal Court

N.Y. County Clerk's # 570588/95

APPELLATE TERM OF THE SUPREME COURT,
FIRST DEPARTMENT

FEBRUARY 1996

PRESENT: HON. STANLEY S. OSTRAU, P.J.
HON. HELEN E. FREEDMAN
HON. WILLIAM J. DAVIS

Justices.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

– against –

LAURIE ARBEITER et al.,

Defendants-Respondents.

#96-022/024

FILED
JUN 20 1996
COUNTY CLERK'S OFFICE
NEW YORK

The People appeal from an order of the Criminal Court, New York County, entered October 27, 1994 (Robert A. Sackett, J.) which dismissed 60 accusatory instruments charging defendants solely with disorderly conduct and 30 accusatory instruments charging defendants with disorderly conduct and resisting arrest.

PER CURIAM:

Order entered October 27, 1994 (Robert A. Sackett, J.) modified, on the law and on the facts, by denying defendants' motions to dismiss the charges of disorderly conduct and by reinstating the accusatory instruments insofar as they relate to those charges; as modified order affirmed.

The discretionary power to dismiss a pending criminal prosecution in the interest of justice is to be exercised sparingly (*see, People v Hudson*, 217 AD2d 53, 55; *People v Harmon*, 181 AD2d 34, 36) and upon reviewing the record in these consolidated appeals, we conclude that none of these matters presents the rare instance where a dismissal in the interest of justice is warranted.

All 90 defendants herein were charged with disorderly conduct, a violation (Penal Law § 240.20, subd [5] [obstructing vehicular or pedestrian traffic] and subd [6] [refusing to comply with a lawful police order to disperse from a public assembly]), in connection with their videotaped participation in a 1994 St. Patrick's Day lesbian and gay "protest" parade on Fifth Avenue in New York City. The substantial impact of the unauthorized parade on midtown vehicular traffic was accurately described by Criminal Court as follows: "When [the] marchers refused a direct police order to leave the intersection of Fifth Avenue and 42nd Street, they snarled traffic for an hour and a half and caused delay and inconvenience for an untold number of their fellow New Yorkers." Despite noting that there was "uncontrovertible" evidence of the defendants' guilt, that police "had a legitimate interest in preventing any public disorder that may have ensued" had the protest parade proceeded unabated, and that no police misconduct occurred during the defendants' arrests, Criminal Court ultimately granted dismissal of all of the disorderly conduct charges in the interest of justice. The principal basis for the trial court's action was its professed disapproval of the City's prior refusal to issue a parade permit to the Irish Lesbian and Gay Organization, of which defendants are members.

The court's disagreement with the City's handling of what safely can be called a sensitive political issue hardly provides a "compelling" consideration "clearly demonstrating" that conviction or prosecution of the defendants would "result in injustice" (CPL 170.40[1]; *see*, *People v Molfino*, 178 AD2d 238, 241), particularly in these circumstances where, as the trial court itself recognized, the "record is bare of any indication that the defendants sought to avail themselves of the judicial process to force the police and city to issue them a parade permit." As one noted jurist explained in a similar setting: "It is irrelevant whether [municipal officials acted] . . . out of factional motivation or because of fear that this [assemblage and the potential response of others to it]..., would be out of control. For their judgment and actions, their conduct is reviewable elsewhere, and not by [Criminal Court in the context of a *Clayton* motion]. . ." [material in brackets supplied] (*People v Horelick*, 30 NY2d 453, 457 [Breital, J.]).

It may be that the defendants present a sympathetic case since, as the District Attorney conceded below, "[t]he sincerity of defendants' belief(s) cannot be doubted." Equally true, however, is the District Attorney's further point that "sincere beliefs are not an excuse for lawless conduct", conduct that past experience has taught is likely to keep recurring. On balance, and since an interest of justice dismissal might have an adverse impact upon public confidence in the criminal justice system (CPL 170.40[1][h]; *see, People v Reyes*, 174 AD2d 87, 90), we conclude that the better result is to reinstate the disorderly conduct charges.

Turning to the charges of resisting arrest (Penal Law § 205.30), Criminal Court correctly concluded that the allegations set out in each of the informations charging defendants with resisting arrest are insufficient, even if true, to establish every element of that offense (CPL 100.40[l][c]; *see, People v Alejandro*, 70 NY2d 133). In merely delaying the inevitable by allegedly remaining seated during the arrest process, defendants did not "attempt[ ] to prevent" their arrest within the meaning of the resisting arrest statute as presently constituted (*see, People v McDaniel*, 154 Misc 2d 89, *lv denied* 81 NY2d

889). Read in accordance with the "ordinary and accepted meaning" (McKinney's Cons Laws of NY, Book 1, Statutes, § 94) of the featured word "prevent" ("to deprive of power or hope of acting, operating or succeeding in a purpose"; implying "an insurmountable obstacle or impediment" [Webster's Third New Intl. Dictionary 1798 [1981]), the provisions of Penal Law § 205.30 simply do not cover the type of inaction attributed to these defendants. As the Appellate Term, Second Department stated in parallel circumstances, ". . .there has been no citation to this court of any statute, rule or ordinance that requires a defendant to cooperate once that defendant is arrested and so long as the defendant does not affirmatively act to resist the arrest (*People v Stevenson*, 31 NY2d 108, 112 [backing up]) then there is no independently unlawful act that the defendant is committing." (*People v McDaniel*, *supra* 154 Misc 2d at 92).

People v Williams (25 NY2d 86), decided under former Penal Law § 1851, does not compel a contary result. In concluding that the acts of passive resistance there involved constituted "resist[ance]" under the predecessor resisting arrest statute, the Court of Appeals tracked the then relevant statutory language, noting that the defendant's conduct in refusing to act as directed was "an *obstruction* to the police officers in the performance of their duty [which] *delayed* his own arrest and necessarily the arrest of the others." (emphasis added) (*id.*, at 90). Significantly, the separate but related concepts of "obstruction" and "delay", which appeared prominently as the lone definitional components of resistance under former section 1851 and were thus appropriately emphasized in *Williams*, were not carried forward into section 205.30. Since section 205.30 represents not a mere "change in phraseology" (dissenting opn at 4) but a dismantling of former section 1851, the decisional law developed under the predecessor statute is not determinative of the meaning of the present statute.

I concur in part and dissent in part /s/ Stanley Ostau

I concur /s/ HEF

I concur /s/ W

APPELLATE TERM, SUPREME COURT, FIRST DEPARTMENT

FEBRUARY 1996

OSTRAU, P.J., FREEDMAN, DAVIS, JJ.

#96-022/024 THE PEOPLE OF THE STATE OF NEW YORK, Applt., -v- LAURIE ARBEITER et al., Defts.-Respts.

Stanley S. Ostrau, P.J. (dissenting in part)

We all agree that the extraordinary remedy of an interest of justice dismissal of the underlying disorderly conduct charges is inappropriate. What divides the court is the issue of the facial sufficiency of the informations charging some but not all of the defendants with resisting arrest (Penal Law § 205.30). Each such information contained a sworn statement by the arresting police officer alleging, in nearly identical form, that defendants "passively" resisted arrest by "refusing to get up and accompany [police officers] to the police van, thus requiring . . . police officers to carry the defendants away from the intersection of 42nd Street and Fifth Avenue." Since I believe that these nonhearsay factual allegations are clearly enough to satisfy the "prima facie case" requirement for facial sufficiency (CPL 100.40 [1] [c], 100.15 [3]), I vote to reverse the order appealed from in its entirety and reinstate all charges.

In *People v Williams* (25 NY2d 86), a unanimous Court of Appeals, construing the predecessor misdemeanor resisting arrest provision embodied in former Penal Law § 1851[1], held that the defendants' passive resistance to arrest in "refus[ing] to get up from the stairs [of the Governor's office] thereby requiring the police to physically carry them out of the building" *(id.*, at 88) constituted criminal conduct under the statute. In so holding, the Court of Appeals flatly rejected the same argument now advanced by defendants herein, "that their inaction cannot be viewed as willful resistance because there was no affirmative duty on their part to assist the officers in making the arrest by walking out of the building [here roadway]." (*id.*, at 90). The Court [per Scileppi, J.] closed its

writing with the following statement which, regrettably, remains true today: "To hold otherwise would necessarily inhibit the police officer in the performance of his duty — a duty, we might add, which has become increasingly more difficult to perform with each passing day." (*id.*, at 91).

The authoritative holding of *People v Williams* continues to be effective and binding under the present formulation of the resisting arrest statute, Penal Law section 205.30[2] which went into effect in 1967 as part of the overall redrafting of the former 1909 Penal Law. The legislative history of the amendment is traced in *People v Bauer* (161 Misc 2d 588, 591-593) and need not be repeated in detail here. It suffices to say that the present version of the statute, a modified form of the resisting arrest provision offered in the Model Penal Code drafted by the American Law Institute, reflects a legislative intent to "broadly proscribe resistance by any means", whether or not the resistance involves "risk of bodily injury" (Model Penal Code § 242.2, comment 8, at 220-221, quoted in *People v Bauer*, *supra*, 161 Misc 2d at 592-593). While the avowed purpose of the revision was to "modernize" the resisting arrest statute along with other penal provisions (*see*, Governor's Memorandum approving L 1995, ch 1080 and 1081, 1995 McKinney's Session Laws of NY, at 2120), there is no indication that the revisers, against the backdrop of our increasingly violent modern society, intended the present section to be more narrow in scope than its predecessor, an intention which, if put into legislative action, would necessarily accomplish the unwanted result of "inhibit[ing] the officer in the performance of his duty" (*People v Williams*, *supra*, 25 NY2d at 91). The result reached by the trial court and endorsed by the majority today accomplishes just that and, in the process, ignores the established canon of statutory interpretation that a "change in phraseology does not import a change in construction" in the context of a general code revision (McKinney's Cons Laws of NY, Book 1, Statutes § 193).

That the same result would have obtained in *People v Williams* had the Court of Appeals been asked to apply the present resisting arrest statute to the facts there presented is

confirmed both by the Court's treatment of the resisting arrest issue framed in *Williams* and its subsequent holding in *People v Stevenson* (31 NY2d 108), a case decided under current Penal Law § 205.30. To place the *Williams* decision in proper perspective, it must be remembered that although the operative facts in that case occurred in 1963, the Court of Appeals decided the appeal in 1969, four years after current section 205.30 was enacted and two years after the statute's effective date. Based upon this chronology and the Court's presumptive awareness of the then recent legislative amendment, it would have made little jurisprudential sense, had the Court intended to signal or leave open the possibility of a different outcome under the amended statute, for the Court to have issued such a strongly worded opinion in a temporal context not likely to recur.

This conclusion is buttressed by the Court of Appeals' 1972 decision in *People v. Stevenson* (supra, 31 NY2d 103), where the Court recognized that a prima facie showing of resisting arrest under Penal Law § 205.30 need not include proof "that a defendant use 'force or violence' in obstructing the officer. It is enough that [defendant] engage in some conduct with the intent of preventing the officer from effecting an authorized arrest of himself or another person". (*People v. Stevenson*, 31 NY2d at 112, quoting Denzer and McQuillan, Practice Commentary, McKinney's Cons Laws of NY, Book 39, Penal Law § 205.30, at 677). Given the present Penal Law definition of "conduct" as "an act *or omission* and its accompanying mental state" (emphasis added) (Penal Law § 15.00[4]), it is clear that the *Stevenson* rule is broad enough to proscribe the conduct of the defendants herein in allegedly refusing to submit to police authority after being advised of their arrest. Such conduct, if shown to have been actuated by the requisite criminal intent, would be enough to establish prima facie that defendants attempted to prevent their arrests in the sense of "frustrat[ing] or "hinder[ing]" them, surely accepted meanings of the word "prevent" (Webster's Third New Intl. Dictionary 1798 [1981]).

People v. McDaniel (154 Misc 2d 89, *lv denied* 81 NY2d 889), cited by defendants and the majority, is inapposite since it involved the legal sufficiency of judgments of conviction rendered after trial, and not the facial sufficiency of the People's pleading. To the extent the memorandum decision of the Appellate Term, Second Department in *McDaniel* can be read to preclude a resisting arrest conviction under Penal Law § 205.30 in any circumstance where the defendant passively goes limp or remains seated in the face of a lawful police command to submit to an authorized arrest, we are not bound by and should decline to follow its unprecedented holding. Notwithstanding *McDaniel's* overly restrictive reading of section 205.30, I believe that this statutory provision, in harmony with its predecessor, "should not be contracted to absolve the defendants of unlawful conduct merely because they engaged in what they conceived to be a form of protest. * * * The civilities of protest, as of freedom itself, are essential if the ordered government of an open society is to survive - it may not be discredited by conduct such as these defendants indulged in here, in defiance of the governing law." (*People v. Crayton*, 55 Misc 2d 213, 214 [App Term, 1st Dept, per Hofstadter, J.] [construing former Penal Law § 1851]).

Our system of criminal justice allows a jury to show lenity to and acquit a defendant despite legally sufficient evidence of guilt (*see, People v. Tucker*, 55 NY2d 1, 7). No analogous mercy power is, nor should be, available to a court of law, particularly an appellate court, in determining the facial sufficiency of an accusatory instrument. Whether the People ultimately can persuade a factfinder to convict these defendants of resisting arrest on the basis of the "passive" resistance attributed to them is, of course, an issue not now before us. The narrow jurisdictional question that is presented here permits of only one legally sound answer: that enough is alleged in these informations to establish a prima facie showing of resisting arrest under any statutory framework.

This constitutes the decision and order of the court.

/s/ Stanley Ostrau

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NEW YORK

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. HOWARD A. LEVINE, Associate Judge

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[1] Former section 1851 of the Penal Law provided: "A person who, in any case or under any circumstances not otherwise specially provided for, wilfully resists, delays or obstructs a public officer in discharging, or attempting to discharge, a duty of his office, is guilty of a misdemeanor."

[2] Section 205.30 reads as follows: "A person is guilty of resisting arrest when he intentionally prevents or attempts to prevent a police officer or peace officer from effecting an authorized arrest of himself or another person."

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

LAURIE ARBEITER et al.,

Appellants.

Cross appeals

CERTIFICATE DENYING LEAVE

I, HOWARD A. LEVINE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Schenectady, New York
December 30, 1996

/s/ Howard A. Levine
Associate Judge

*Description of Order: Order of the Appellate Term, First Department of June 19, 1996 upholding the dismissal of the resisting arrest charges and reversing the dismissal of the disorderly conduct charges of the order of Criminal Court, New York County, entered October 27, 1994